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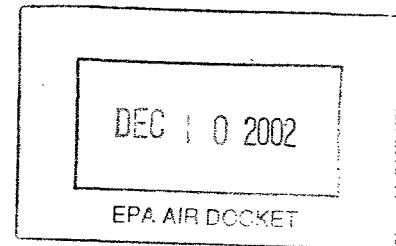
To: a-and-r-docket@epamail.epa.gov  
cc:  
Subject: Attention Docket ID No. OAR-2002-005

A-98-49  
VI-C-4  
EDOCKET #:  
OAR-2002-0005-0011

a-and-r-docket@epa.gov,  
I would appreciate receiving an email acknowledging receipt of CCNS's comments. Thank you.

December 9, 2002

By email to: a-and-r-docket@epa.gov



Air Docket, Room M-1500  
U.S. Environmental Protection Agency  
401 M Street, SW  
Mail Code 6102  
Washington, DC 20460

**Re: Attention Docket ID No. OAR-2002-0005**

Dear Air Docket:

Concerned Citizens for Nuclear Safety (CCNS) makes the following comments regarding the proposed rule prepared by the Environmental Protection Agency (EPA) to change certain provisions of 40 CFR 194 regarding the Criteria for the Certification and Recertification of the Waste Isolation Pilot Plant's Compliance with the Disposal Regulations, Alternative Provisions, and Proposed Rule, as published in the *Federal Register* on August 9, 2002, pages 51930 to 51946.

CCNS has been actively involved regarding health and safety issues related to Waste Isolation Pilot Plant (WIPP) for more than 14 years. CCNS was an active participant in the WIPP certification process.

These comments are in addition to oral comments made at the public hearing in Santa Fe, New Mexico on September 25, 2002. As is acknowledged by EPA in the *Federal Register* notice, CCNS expects full consideration of both written and oral comments.

1. **EEG-83.** CCNS strongly suggests that EPA incorporate, review and respond to the concerns raised in the September 2002 report of the Environmental Evaluation Group (EEG), entitled *Identification of Issues Relevant to the First Recertification of WIPP*, EEG-83. The EEG's purpose is "to conduct an independent technical evaluation of WIPP to ensure the protection of the public health and safety and the environment of New Mexico." EEG-83, p. iii.

The EEG raised several unresolved issues, including actinide solubility, fluid injection, solution mining, Culebra flow and transport, spalling, and non-random waste emplacement. The issues raised by EEG are of concern for the people of New Mexico, and EPA should respond to them in a scientifically and defensible manner.

**2. Public Hearing Process.** As stated in our oral comments, CCNS was very disappointed with how EPA handled the public hearing process in this matter, which resulted in substantially reducing the number of participants that otherwise would have testified. The timing of the hearings in Albuquerque and Santa Fe precluded most interested citizens from being able to participate because of the large number of other WIPP-related matters that required immediate attention. As a result, only two people, in addition to a representative from Southwest Research and Information Center (SRIC), testified at the Albuquerque hearing on September 24. Those other two people represented an existing WIPP subcontractor and the second, while speaking as an individual, is an employee of Sandia National Laboratory, which is a major WIPP contractor. Only CCNS and three other people, including a representative of Westinghouse TRU Solutions, the WIPP operating contractor, testified in Santa Fe on September 25.

In contrast, dozens of members of the general public testified in both Albuquerque and Santa Fe at EPA rulemaking hearings about WIPP. Based on this experience, CCNS strongly reiterates its request that all future rulemakings or other public processes involving WIPP that EPA consult with leading citizen organizations, including SRIC, Nuclear Watch of New Mexico, and Citizens for Alternatives to Radioactive Dumping, as well as state officials, *prior to scheduling any hearings.*

**3. Proposed Changes to 40 CFR 194.2.** CCNS does not object to adding the definition of acceptable knowledge. However, CCNS does object to the lack of clarity in the proposed definition of "minor alternative provision." CCNS believes that a better, preferable definition would be:

*"Minor alternative provision means an alternative provision to these Compliance Criteria that only clarifies an existing regulatory provision, and does not substantively alter the existing regulatory requirements."*

Also, please see our comments under No. 4.

**4. Proposed Changes to 40 CFR 194.6.** CCNS's major concern regarding the proposed change to 40 CFR 194.6(b) is about potential differing interpretations of the EPA and the public regarding what constitutes a "minor alternative provision."

CCNS is especially concerned about this possibility because of our experience with how another regulatory agency for WIPP, the New Mexico Environment Department (NMED), has interpreted a somewhat similar EPA regulation. The other regulation is 40 CFR 270.42(d)(2)(i) regarding "minor changes" to Resource Conservation and Recovery Act (RCRA) permits. Because NMED interpreted minor changes to include a total reversal of condition IV.B.2.b of the WIPP permit, SRIC, a non-profit organization, is before the New Mexico Supreme Court challenging the NMED decision. Southwest Research and Information Center, et al. vs. State of New Mexico, New Mexico Environment Department, et al., Docket No. 27,578.

CCNS notes that EPA would continue to maintain a public comment period before making its decision on the "minor alternative provision," something that minor, class 1 RCRA modifications do not require. However, CCNS believes that the public comment period should be longer than the proposed 30 days. CCNS favors a 60-day comment period to ensure that the public is informed and has an adequate time to comment. Given that there is no instant notification of all interested persons and that the 30 days could sometimes include holiday seasons or even other times when the public is very burdened with other matters (as EPA experienced at the New Mexico hearings in September), 30 days would not provide sufficient time for public comment, especially if the same notice include several alternative provisions.

Further, CCNS is concerned that the proposed rule does not specifically provide for a change being considered under both 40 CFR 194.6(a) and (b). For example, EPA could notice a change as "minor" under subsection (b), but after considering public comment, it may be clear that it is not minor and must be considered under subsection (a). In that instance, CCNS believes that EPA must issue a notice of final rulemaking rejecting the change and then re-notice it for public comment under 40 CFR 194.6(a).

CCNS advocates an additional provision in 40 CFR 194.6(b)(3), which requires renumbering the existing subsection (3) to become (4):

"(3) In making its final determination about whether a change is 'substantive,' EPA will rely on public comment and will fully justify its determination."

CCNS believes that such an additional provision is necessary to significantly lessen the possibility that a change in the Compliance Criteria that EPA deems "minor," but that the public views as major, could be approved without going through the requirements of the existing rule or revised 40 CFR 194.6(a).

**5. Proposed changes to 40 CFR 194.8.** CCNS agrees that public involvement in the approval of waste characterization programs has been inadequate. CCNS believes that a significant source of the problem is related to the fact the EPA issued 40 CFR 194.8 as part of the WIPP certification decision on May 18, 1998, resulting in no opportunity for public comment on the proposed provision.

CCNS's major concern is that EPA has decided that the existing requirement should be changed because DOE's program "will overwhelm our resources." 67 Fed. Reg. 51939 CCNS believes that this is an inappropriate justification. CCNS, Congress and the public are concerned about the health and safety of present and future generations. The WIPP Land Withdrawal Act (LWA), Public Law 102-579, as amended, Section 23, is a commitment from Congress to provide adequate resources to EPA in order for the Agency to protect public health and safety and the environment.

EPA's proposed solution to the "problem" is unacceptable. The proposed Baseline Compliance Decision could apply to all wastes to be characterized at a site for the next 30 years. This could cover waste that has not been generated yet. EPA should be requiring DOE to minimize its waste generation requiring disposal at WIPP.

CCNS strenuously objects to the open-ended nature of the proposed 194.8(b). We believe that for the WIPP site, that is supposed to operate for 35 years and safely contain radionuclides for 10,000 years and more, that a one-time approval of waste characterization practices would be unsafe and irresponsible. Thus, any baseline decision should be limited by rulemaking to no more than a specified number of years. CCNS would suggest no more than three (3) years. Thus, the baseline would need to be reviewed and updated at least every three years.

As further support for CCNS's position, we note that all existing sites have had some difficulties fully complying with EPA's requirements. CCNS believes it is appropriate to tie certification requirements for WIPP disposal with waste characterization problems at individual sites. Another deficiency of the proposed rule is that it does not describe instances of non-compliance. For example, in 2001, under the existing system, the Idaho National Engineering and Environmental Laboratory (INEEL) sent at least 54 shipments to WIPP that contained drums that were not properly certified. EPA should describe this and other problems and discuss how the proposed rule will improve DOE's performance and EPA's oversight.

The proposed rule does not require, but only allows, EPA to take action under subsection 4(b)(1) and (2). Thus, the only immediate action that could be taken is suspension, as modification or revocation could only be done through rulemaking, pursuant to 40 CFR 194(b)(1). Thus, DOE and other interested parties would have full opportunity to comment to EPA before the WIPP certification could be modified or revoked. However, CCNS certainly believes circumstances could arise in which major, substantial noncompliance with waste characterization at a generator site should cause suspension of the certification. The proposed rule should address these circumstances.

Under the proposed rule, such suspension could only occur if EPA first determined that a site was not in compliance with approved waste characterization programs or processes. Such a determination would almost certainly occur after such noncompliance had persisted for some time, perhaps months or years related to large amounts of waste being emplaced at WIPP. In such a circumstance, wastes could have been emplaced at WIPP that exceed limits established in the WIPP certification, or otherwise violate requirements of the certification. Certainly, EPA should be clearly authorized to not only suspend shipments from the generator site, as provided in the proposed rule, but to also take action regarding the WIPP certification.

CCNS would also point out in further support of the proposed rule that EPA has always considered DOE/WIPP to be responsible for the certification and its compliance. 67 FR 51935. This fact further alone makes clear to the Carlsbad Field Office (CBFO) that its ability to maintain the WIPP certification and the site's operations could be dependent on each generator site's compliance with the waste characterization requirements of the WIPP certification is appropriate, and indeed necessary, as it creates strong incentives for CBFO to ensure that generator sites are adequately characterizing their wastes before sending them to WIPP. Thus, CCNS supports the proposed 40 CFR 194.8(3)(i) and encourages EPA to preserve it in the final rule and to not modify or remove it as was suggested by the oral comments made by WIPP contractors at the Albuquerque hearing.

CCNS believes that 40 CFR 194.8(b)(2)(iii) should provide for at least a 60-day public comment period. In the language of the proposed rule, there is no timeframe given for the public comment, although the preamble states that there would be a 30-day public comment period. at 51936. As noted above, CCNS believes that a 30-day comment period is too brief for "minor alternative provisions," and it is also too brief for meaningful public comment on what should be voluminous documents regarding a specific site's compliance.

CCNS believes that another reason for the small number of public comments regarding waste characterization at generator sites is the 30-day comment period that has been provided. If EPA genuinely wants improved public involvement, it must provide a longer public comment period in 40 CFR 194.8.

**6. Proposed changes to 40 CFR 194.12 and 194.13.** CCNS does not oppose the reduction in the number of paper copies of compliance applications and reference materials so long as each of the New Mexico dockets receives a paper copy of compliance applications and all reference materials and ready access to an alternative format. If EPA's proposed five paper copies do not include copies for the New Mexico dockets, the number of paper copies should be increased to accommodate copies for those dockets. Further, EPA should state in its preamble to the final rulemaking that the intent is to provide paper copies to each New Mexico docket.

CCNS's concern, as expressed at the public hearing, is that as one of the nation's poorest states, many New Mexicans do not have access to the Internet and must depend on paper copies. Thus, CCNS would strongly oppose any reduction in availability of written copies in the dockets. At the same time, CCNS also recognizes the limited resources of the libraries in which the dockets are located so that they should be provided with compact disks or similar electronic format materials so that some docket users can have that format readily available, should they so desire.

CCNS also believes that the rule should require that DOE make copies of compliance applications and reference materials widely available to the public in either written or electronic form. Thus, we propose the following language to be included in both sections:

"The Department shall ensure that copies of compliance applications [or reference materials] are made available to the general public, upon request."

**7. Proposed change to 40 CFR 194.24.** As stated above, CCNS does not object to the change from "process knowledge" to "acceptable knowledge."

Thank you for your careful consideration of our oral and written comments.

Sincerely,

Joni Arends  
Waste Programs Director

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Joni Arends  
Waste Programs Director

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